T/SOR/22/7/8

Professor Wedderburn

ON THE INDUSTRIAL RELATIONS BILL

'The Bill is at least an irrelevance, at worst a legal nightmare —as much for line managers as for workpeople—and it will not deal with any of the causes of industrial disputes.'

'The biggest piece of public mystification of this century.'

'The Bill would restrict trade union rights and run labour relations into a swamp of legal squabbling.'

SIXPENCE (2½p)

TEXT OF A SPEECH BY K. W. WEDDERBURN

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at the Royal Albert Hall, London : January 12th 1971

of 'industrial dispute'. Yet, not one single word of that proposed change appeared in the Consultative Document of October 1970. You must read the small print.

The small print in the Bill

I want to appeal to every person in the country to get to know about the small print in this Bill. Professor Dicey said about the 1906 Bill that not one Englishman in a hundred knew its true legal effect. Well, that Bill had five clauses. This one already has 150 clauses and eight Schedules; and I doubt whether one person in 100,000 has any idea at all of its true legal effects. That is partly because the false image with which this Bill has been sold has been the biggest piece of public mystification of the century.

The Solicitor General has claimed that the Bill merely introduces a 'framework of law' of which 'the major part' is 'directly in line with Donovan recommendations'. Nothing could be less accurate. We already have a 'framework of law', law which may well need reform, but which sets out not to regulate but to support a voluntary system of industrial relations. But this Bill sets out to *replace* totally our existing legal framework with a new system, largely based upon ill-chosen snippets of American laws unsuitable to British conditions; and as the Consultative Document frankly puts it, the Government aims to use legal regulations and legal sanction as the '*main instrument*' of policy for changing industrial relations. Now that was *exactly* what the Donovan Royal Commission unanimously told Government not to do. And that report was supported by very weighty research. The Government's Bill has been prepared on the basis of *Fair Deal at Work*, a scrawny little pamphlet written before Donovan even reported, unsupported by any worthwhile research at all.

National Industrial Relations Court

The *causes*, as opposed to the symptoms, of industrial disputes are not going to be improved by arguments in court-rooms, but by patient new initiatives in voluntary negotiation and local arbitration—the sort of thing the CIR and TUC have begun to promote but will be prevented from promoting by this Bill. I suggested to the Donovan Commission that: 'One Scamp is worth a dozen injunctions' of the High Court. By 1972, if this Bill and the NIRC come in, one Scamp will be worth ten dozen orders from the NIRC.

How would the NIRC enforce its orders? Against a trade union, by seizure of its assets (true, with a limit of £100,000 if it is registered—but £100,000 each time). And against anyone organising or financing a

prohibited industrial action the orders will be enforced by penalties or even by imprisonment, unless he is a trade union official who proves he acted exactly within the scope of his authority (another field day for lawyers). The Government is quite correct in saying that any ultimate imprisonment would not be for a crime. It would be for civil contempt of an order of the NIRC. But even if you explain that nice legal distinction for his imprisonment to a gaoled shop steward, his reply, I suspect, would be anything but civil. Whether it is technically civil or criminal, the NIRC can be the first step to gaol for those who step out of line.

The Bill would make the NIRC the arbiter of deep issues of policy which are properly the subject of negotiation; and that is something likely to damage the very fabric of our legal institutions. Worse still the Bill would weaken at every turn the strength of organised groups of working people. When you read the small print, these are the two salient characteristics of the Bill—*not* the introduction of some framework of fair rules of cricket into an hitherto uncontrolled ball-game—but an attempt at tight legal regulation of a hitherto voluntary system of industrial relations, and tight restraints on workpeople's rights.

The right to organise

Tonight, since I have no time for details, let me summarise just three areas of law where the Bill would have these effects—on the right to organise in strength; on the right to strike; and on collective agreements.

First, the Bill is a charter for blacklegs and non-unionists. It would enact a right for a worker *not* to be a trade unionist as well as a right to be a trade unionist. The Donovan Report explained very clearly the false character of this apparent equation. The right to *be* a trade unionist promotes collective bargaining; a *legal* right *not* to be a unionist is, as the Report put it, 'designed to frustrate the development of collective bargaining'. Under the Bill it will be normally unlawful to take industrial action to protect trade union strength against non-unionist free riders. Thousands of workers will lose the right to insist on working alongside only union colleagues—a right they have had for fifty years. And for the first time ever the British statute book will include a law designed 'to frustrate the development' of collective bargaining.

Donovan also rejected prohibition of the closed shop; but the Bill prohibits pre-entry closed shops. It will allow only an 'agency shop' system. Even that is not 100 per cent membership; and it is permitted only if voted for by 51 per cent of *all* the relevant workers (abstentions count as votes against); it is open to challenge in a new ballot by a small 20 per cent

minority at any time (clause 14)—a standing threat to stable bargaining arrangements, a standing invitation to breakaways; and if the union ever fails to attract 51 per cent of the electorate in a ballot it is unlawful to raise the matter again for two whole years. The same loading of scales against strong trade union organisation and the same threat to established stable procedures appear in the clause that would allow the NIRC—on the CIR's advice—to make legal orders defining bargaining units and to certify what union or unions can bargain. An employer can even make an application under Clause 42 for the sole recognition of a workers' organisation which is not even *independent*—for a 'house union'; and from the moment of that application it is unlawful for a genuine union to take industrial action about recognition.

Registrar in control

The new legal rights for free riders are really the first of two pincers thrust into trade union strength by the Bill. The second pincer is the control through NIRC over the rules and conduct of all workers' organisations and the enormous new powers of the Registrar and NIRC over unions that register. Admission to unions will no longer be a matter for union rules but for legal decision by the Registrar and the NIRC as to whether someone is 'reasonably well qualified' and should 'reasonably' be admitted. The same goes for whether someone has been 'unfairly' or 'unreasonably' disciplined. For registration as a State-approved trade union, an organisation will need not only to have rules which meet the rigid new regulations in the Bill but will have to meet 'any other requirements' the Registrar likes to impose (Clause 64). Union rules will be so controlled that voluntary inter-union arrangements, like those of the TUC, will exist almost at the discretion of the Registrar and of NIRC. And not content with that, the Government is now apparently considering a second register for 'professional' unions like the BMA with special exemptions.

The right to strike

Secondly, the right to strike: The Bill makes it unlawful to strike for anything that is an unfair industrial practice (for example, to stop an influx of non-unionists); it is also unlawful then to take what the Bill coyly calls any other 'irregular' industrial action (which includes almost all other industrial action since that action usually involves some breach of employment contracts). Notice: for workpeople the limits apply to calling, financing or threatening strikes or *any other* 'irregular' industrial action. For employers, they apply only to lockouts, and not to the thousands of

other ways (short of dismissal) in which an employer can put pressure on his workers.

Next, under Clause 85, inducing any breach of contract—an inevitable consequence of most strikes—is an unfair industrial practice except (and the Government always stresses this) for a registered union and its authorised officials. But the next two clauses of the Bill effectively negative that protection even for the registered unions. Clause 86 makes it unlawful to *aid and abet* an unfair practice. The Secretary of State was asked in Parliament whether this clause did not mean a union was almost certain to lose its protection under Clause 85 if it made a strike by members official. All he could say was the question 'is a very difficult one . . . which needs the reply of a lawyer'. The Secretary of State may have passed his written examination on the Bill with the help of his civil servants but he certainly could not pass his oral. But we should not criticise too harshly. The Secretary of State was only in the position thousands of managers and union officials will be in if this Bill becomes law—face to face with laws he could not interpret with any certainty at all, without legal advice—and probably not even with it.

Then comes Clause 87. That would outlaw strikes interfering with the business of any employer who is an '*extraneous party*' to a dispute. Some people think that sounds fair—until you read the small print. 'Extraneous party' does not mean just 'innocent third party'. It is defined so that it can include a company under the same financial control as the employer in the dispute, even if it is situated next door. Clause 87 would make unlawful sympathetic and other secondary strike and solidarity action which has been lawful in Britain for decades. Two leading American professors at Yale Law School put it well when they said about the similar Taft-Hartley law in the USA, that curtailing secondary action makes unions 'enter the economic struggle with one hand tied'.

When you look at all these legal restrictions in the Bill, it is highly likely that the severe limits it proposes on the rights to organise and to strike infringe the international obligations of the British Government under ILO Convention 87, Articles 2, 3 and 7; and under the European Social Charter, 1961, Article 6.

Collective agreements

Thirdly, collective agreements. Without waiting to hear what Donovan had to say, *Fair Deal at Work*, 1968 declared that Conservative policy was to subject collective agreements to the law applying to ordinary contracts 'no more and no less'. But the Bill attaches a conclusive presumption of

legal enforceability to written collective agreements and to any written decisions of any negotiating body—from works committees to joint councils up and down the land—unless *both* parties agree otherwise in writing. That is not only legalism run mad—legalism which will destroy the flexibility which is one great virtue of our present system; it is not the ordinary law of contract.

Then the Bill allows an employer or the Secretary of State to apply to the NIRC for an order to *impose* procedures at a place of work and that order is to be binding 'as if a contract' had been made by the union and employer. Well—that is not the ordinary law of contract.

Then again, wherever a collective agreement is a binding contract, it is to be unlawful for the union not to take 'all such steps as are reasonably practicable' to stop not only members or officials but any other person 'purporting to act' for the union from breaking the agreement. This is not just legalism run mad (the interpretation of these words alone will keep NIRC going for a few years); it is also an attempt to make trade unions *police* industrial procedures, which, Donovan warned, is likely to increase industrial difficulties; and it is certainly not the ordinary law of contract.

Those are just three of many headings under which the Bill would restrict trade union rights and run labour relations into a swamp of legal squabbling. The Bill is at best an irrelevance, at worst a legal nightmare—as much for line managers as for workpeople—and it will not deal with any of the *causes* of industrial disputes. This attempt to cut all the knots of what are often frustrating problems by a sharp swing of a legal axe is more likely to commit butchery than surgery on the fabric of British industrial relations, and the axe will fall on the strength of the trade unions.

Industrial democracy

In conclusion, let me add this. Some people say that to oppose the Bill, to adhere to the ways of voluntaryism, to the long haul of negotiation—that this is a 'negative' attitude. I believe history will show this view to be wrong. I see opposition to this Bill not as something negative, but as based upon a positive affirmation, that only a strong, free trade union movement can secure for working people, blue collar or white, deliverance from the status of second-class citizenship at work.

The way to industrial democracy requires strong unions in which members and officials participate together in ever-widening areas of decision-making at the workplace. This demand that democracy be extended not only in political but in industrial life, is being heard across Europe; for it is an extension without which those who wield power in

modern society are likely to impose an increasing dehumanisation on workers who live by selling their labour. But the positive vision of an expanding industrial democracy is not the vision of this Bill. I believe as its small print is revealed and as its false image becomes clear, thousands of people will recoil from this Bill, and will understand and applaud an opposition to it which expresses the very different spirit of a positive demand by ordinary men and women for a more just, a more democratic society in what still can be made a greener and more pleasant land.

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Published by
TRADES UNION CONGRESS CONGRESS HOUSE
GREAT RUSSELL STREET LONDON WC1B 3LS

Printed by Macdermott & Chant (T.U. all Depts.), Enfield and Welshpool.